IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. HEATHCOTE HOLDINGS CORP., INC.,	)	
Plaintiff,	)	Civil Action No. 1:10-cv-01471
v.	)	Judge: Hon. David H. Coar
LEAPFROG ENTERPRISES, INC.,	)	
Defendant.	)	

DEFENDANT LEAPFROG ENTERPRISES, INC.'S NON-OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY IN OPPOSITION TO LEAPFROG'S MOTION TO DISMISS

On July 2, 2010, Plaintiff Heathcote Holding Corporation, Inc. ("Heathcote") filed a Motion for Leave to Cite Additional Authority in Opposition to Defendant LeapFrog Enterprises, Inc.'s ("LeapFrog") Motion to Dismiss. (Dkt. No. 36.) Heathcote argues that a recent decision out of the Northern District of Texas in *Patent Compliance Group, Inc. v. Interdesign, Inc.*, No. 10-0404 (Jun. 28, 2010) "addressed and rejected the same arguments Leapfrog (sic) advances in its motion to dismiss." (*Id.* at ¶ 4.) For the reasons set forth below, LeapFrog wholly disagrees with Heathcote's characterization of *Interdesign*'s relevance. LeapFrog does not oppose the motion itself.

First, Heathcote's selective citation to additional law from Texas is circumspect, given its failure to acknowledge, much less distinguish, relevant case law out of ***this District*** predating its opposition and rejecting its position. *See* LeapFrog's Reply Brief In Support of Its Motion to Dismiss (Dkt. No. 35), at fn. 2 (discussing *Simonian v. Cisco Sys., Inc.*, No. 10-C-1306 (Jun. 17, 2010). Heathcote's failure to distinguish the facts in this case from recent case law out of the

Northern District of Illinois is more persuasive that its belated reliance on a distinguishable opinion out of the Northern District of Texas. Moreover, as the opinion itself acknowledges, the holding in *Interdesign* is inconsistent with case law from other districts. (Ex. A at 17-18) (discussing *Brinkmeier v. Graco Children's Prods., Inc.*, 684 F. Supp. 2d 548, 553 (D. Del. 2010))[1]

Second, *Interdesign* is clearly distinguishable from the facts presented here. Critically, the *Interdesign* patent ***had expired*** almost three years prior to the institution of the litigation. (*Id.* at 1.) Given that the patent was expired, the Court drew an inference from plaintiff's pleadings that the defendant intended to deceive the public. (*Id.* at 19) ("As a sophisticated corporation with patent experience and available legal counsel, Plaintiff creates an inference that Defendant knew the patent expired.") The Court found further support for its conclusion in documentary evidence attached to the complaint: "[A]n actual photograph of a product injected into the stream of commerce with an expired patent number also creates an inference of a false statement." (*Id.*) Contrary to *Interdesign*, it is undisputed that LeapFrog's patents-in-suit are not expired, and that Heathcote's pleadings are wholly absent evidentiary support demonstrating that any allegedly improper marked product was injected into the stream of commerce. On these facts, the inference of intent to deceive that the court found in *Interdesign* is inappropriate.

Dated: July 9, 2010

COOLEY LLP

By: */s/ Matthew P. Gubiotti*

Thomas J. Friel, Jr. (*pro hac vice*)
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[1] "Ex. A" refers to Exhibit A from Heathcote's Motion for Leave to Cite Additional Authority in Opposition to Defendant LeapFrog Enterprises, Inc.'s Motion to Dismiss. (Dkt. No. 36.)

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010, a copy of the foregoing document was served via the Court's electronic filing system, on the following attorneys of record:

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